

YANKEE GULCH JOINT VENTURE ET AL.

IBLA 84-626

Decided January 22, 1985

Appeal from decision of Colorado State Office, Bureau of Land Management, rejecting sodium preference right lease applications. C-0118328, C-0118329, and C-0120057.

Set aside and referred for hearing.

1. Administrative Procedure: Hearings -- Mineral Leasing Act:  
Generally -- Sodium Leases and Permits: Leases -- Sodium Leases  
and Permits: Permits

A sodium prospecting permittee who applies for a sodium preference right lease, alleging with supportive data that he has discovered a valuable deposit of sodium and that the land is chiefly valuable for sodium, as required by sec. 24 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 262 (1982), is entitled to a hearing before an Administrative Law Judge, pursuant to the provisions of 43 CFR 3521.1-1(j)(2), before his lease application may be finally rejected.

APPEARANCES: Philip E. Johnson, Esq., and Jacques S. Ruda, Esq., Denver, Colorado, for appellants; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Yankee Gulch Joint Venture (Yankee Gulch) and others have appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated March 13, 1984, rejecting their sodium preference right lease applications, C-0118328, C-0118329, and C-0120057. 1/

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1/ Yankee Gulch is the current applicant with respect to lease applications C-0118328 and C-0118329. Nielson Resources Corporation, Hogle Investment Company, Edward N. Juhan, Barbara Jean Juhan Hunter, and Joseph Paul Juhan are the current applicants with respect to lease application C-0120057.

On April 28 and 29, 1966, appellants filed sodium preference right lease applications for 7,151.19 acres of land situated in Rio Blanco County, Colorado, within the Piceance Creek Basin, pursuant to section 24 of the Mineral Leasing Act, as amended, 30 U.S.C. § 262 (1982). The statute provides that preference right leases shall be issued to prospecting permittees upon a showing "to the satisfaction of the Secretary of the Interior" that the land sought contains a valuable mineral deposit and is chiefly valuable for that mineral. Id. In filing the lease applications, appellants or their predecessors-in-interest asserted that valuable deposits of sodium had been discovered. By decision dated May 3, 1968, the Department afforded appellants or their predecessors-in-interest an opportunity for a hearing in order to determine whether the land qualified for leasing pursuant to the statute. See Kaiser Aluminum and Chemical Corp., A-30982 (May 3, 1968). Timely requests for hearings were made by appellants or their predecessors-in-interest. However, no hearings were held.

In a memorandum dated July 27, 1967, the Regional Mining Supervisor, Geological Survey (Survey), stated that, based on the results of two drill holes within the lands in lease applications C-0118328 and C-0118329 and other information submitted in support of the applications, the land sought contains valuable deposits of sodium-bearing minerals, primarily nahcolite, but is only chiefly valuable for such minerals with respect to lease application C-0118328, when compared with oil shale values. The memorandum recommended that a lease be issued only for application C-0118328. Based on additional information, subsequently tendered, the Regional Mining Supervisor, Survey, prepared another memorandum, dated January 7, 1970, which concluded that the land sought in all three lease applications contains valuable deposits of sodium and is chiefly valuable for sodium. The memorandum recommended that if leases were issued with respect to the three applications they be limited to the saline zone in the Parachute Creek Member of the Green River Formation.

Effective July 1, 1971, four sodium preference right leases, C-0118326, C-0118327, C-0119985, and C-0119986, were issued to the Wolf Ridge Joint Venture (Wolf Ridge) and others, for lands which were located in the Piceance Creek Basin. The leases were limited to sodium deposits in the saline zone of the Parachute Creek Member of the Green River Formation and provided certain measures for the protection of the oil shale intermingled with the sodium and located outside the saline zone.

By letter dated August 28, 1972, BLM requested that appellants (or their predecessors-in-interest) furnish certain additional information, including the proposed mining operations, to allow BLM to complete an environmental analysis of the impact of issuance of leases. Additional information was subsequently filed with respect to lease applications C-0118328 and C-0118329.

By letters dated June 23, 1976, BLM requested further additional information, in accordance with the newly amended regulations applicable to preference right lease applications, specifically 43 CFR 3521.1-1(b). The latter regulation provides that certain information, including the quantity

and quality of the minerals discovered and proposed mining operations, which constitute an initial showing, should be submitted with lease applications. On June 27 and July 5, 1977, appellants (or their predecessors-in-interest) submitted numerous additional documents in support of the lease applications.

By memorandum dated August 13, 1979, the Acting Conservation Manager, Central Region, Survey, recommended to BLM that the initial showing under the three lease applications be accepted. In a memorandum dated January 19, 1982, the Conservation Manager, Central Region, Survey, informed BLM that Survey had determined that the land involved herein contains valuable deposits of sodium and is chiefly valuable for sodium, pending a final showing and environmental assessment.

By memorandum dated February 10, 1982, the State Director, Colorado State Office, BLM, instructed the District Manager, Craig District, BLM, to prepare a technical examination/environmental assessment in accordance with 43 CFR 3521.1-4. On August 31, 1982, the District Manager, Craig District, BLM, transmitted the Final Environmental Assessment (No. CO-017-82-55) to the State Office, with the recommendation that BLM amend the area management framework plan to allow leasing subject to certain stipulations and contingent upon the applications satisfying the final showing and chiefly valuable criteria.

By decisions dated February 17, 1983, BLM instructed appellants (or their predecessors-in-interest) to submit final showings in accordance with 43 CFR 3521.1-1(c). BLM transmitted proposed leases with its decisions. The proposed leases were substantially identical to the leases issued to Wolf Ridge and others. 43 CFR 3521.1-1(c) provides that after receipt of the technical environmental analysis report and the proposed lease, an applicant shall submit additional information, including estimates of revenues and costs for the proposed mining operations and a comparison thereof, which constitute a final showing. On April 18, 1983, appellants submitted their final showings in accordance with 43 CFR 3521.1-1(c).

By memorandum dated May 6, 1983, the State Director, Colorado State Office, BLM, again requested the District Mining Supervisor, Minerals Management Service (MMS), to submit a report and recommendation whether the land involved herein contains valuable deposits of sodium and is chiefly valuable for sodium.

In a technical review dated July 22, 1983, BLM, which assumed the functions of MMS, concluded that the land involved herein did not contain valuable deposits of sodium because there was not a reasonable probability that the sodium can be mined, extracted, removed, and marketed at a profit. BLM based this conclusion in part on its determination that, under the proposed lease, the structural integrity of the oil shale deposit must be preserved, and that the applicants had not demonstrated that structural integrity could be maintained at a cost which would permit the marketing of the sodium in competition with other established suppliers. On December 2, 1983, appellants submitted a response to BLM's technical review and additional evidence in support of their lease applications.

In its March 1984 decision, BLM rejected appellants' lease applications because of its determination that the land does not contain valuable deposits of sodium. The rejection determination did not reach the question of whether the land is chiefly valuable for sodium. BLM stated:

For the reasons more fully elaborated in our report of July 22, 1983, it is our conclusion that you have failed to provide information to give us reasonable assurances that your development plans will allow economic extraction of the sodium deposits without damage to the oil shale resources in accordance with the provisions of the proposed lease. It is not enough to claim that no damage will occur. It is the obligation of the applicant to submit reasonable factual evidence that this can be done. In the absence of such evidence the BLM has no choice but to deny lease issuance. It is not the purpose to issue preference right leases for research projects designed to test the feasibility of unusual mining or processing scenarios or to determine whether mined products can be processed to meet requirements of speculative markets.

In their statement of reasons for appeal, appellants contend that BLM has failed to address the bulk of the evidence submitted in support of their applications and mischaracterizes certain evidence. Appellants also contend that the decision is arbitrary, capricious, and in error. Appellants argue that BLM violated Departmental regulations by requiring that a detailed mining plan and evidence that mining will not adversely affect oil shale resources be submitted at the final showing stage, rather than after lease issuance. Finally, appellants contend that the 18-year delay in adjudication of their lease applications is a denial of due process and that issuance of sodium preference right leases on adjacent, "virtually identical" land is a denial of equal protection under the law. Appellants incorporate their response to BLM's technical review in the statement of reasons.

In an answer to appellants' statement of reasons, BLM contends that much of the evidence submitted by appellants has been "of questionable quality and marginal relevance," and that it has all been carefully considered. BLM also states that evidence was not mischaracterized and that the requirement to furnish a detailed mining plan and evidence that economic extraction of the sodium could take place without adversely affecting surrounding oil shale resources was consistent with the regulations. BLM finally contends that the mere passage of time in adjudicating appellants' applications does not violate appellants' rights and that in this time BLM may have determined that it erred in issuing leases on adjacent land. BLM also postulates that the sodium deposits in the land under application and those in the leased land may differ.

[1] Current Departmental regulations provide that, if a preference right lease application is rejected, the applicant may not only appeal that rejection but has a "right to a hearing" before an Administrative Law Judge "if he has alleged, in his application, facts sufficient to show that he is entitled to a lease." 43 CFR 3521.1-1(j)(2). We find that appellants (or their predecessors-in-interest) have alleged sufficient facts which, if proven, would entitle them to sodium preference right leases. Appellants

(or their predecessors-in-interest) have requested hearings and the case involves questions of fact regarding whether valuable deposits of sodium exist within the land involved herein. Thus, it is appropriate that a hearing be held. Accordingly, we hereby order a hearing to be held pursuant to 43 CFR 3521.1-1(j). Marine Minerals Corp., 76 IBLA 68 (1983); John S. Wold, 48 IBLA 106 (1980).

In assessing whether a valuable deposit of sodium has been discovered within the limits of each parcel of land subject to a preference right lease application, the valuable deposit must be shown to exist as of the expiration date of the prospecting permit which preceded the preference right lease application. <sup>2/</sup> 43 CFR 3520.1-1(a); Marine Minerals Corp., *supra* at 71. In John S. Wold, *supra* at 116, we limited appellants' evidence respecting drill hole data to "those drill holes in existence during the term of the prospecting permit." We believe that this time limitation will also play a crucial part in the decision of the present case. The case appears to involve crucial questions whether the sodium in the saline zone of the Parachute Creek Member of the Green River Formation found in the lands subject hereto can be economically extracted without adversely affecting the surrounding oil shale resources, *i.e.*, considering the expense of protecting such resources can the sodium can be mined, extracted, removed, and marketed at a profit. <sup>3/</sup> These questions involve a consideration of mining technology.

In addition, there appears to be a question whether there is a demand for the nahcolite as an agent in removing sulfur dioxide from the gaseous emissions of industrial plants, which is one of the purported markets for the nahcolite.

In presenting evidence of a valuable deposit of sodium, appellants should be limited to evidence which demonstrates facts which were in existence prior to the expiration of the prospecting permits or which could reasonably have been anticipated at that time. See In re Pacific Coast Molybdenum Co., 75 IBLA 16, 28-30 (1983). The standard for judging whether a valuable deposit has been discovered permits consideration of evidence which leads to a "reasonable expectation" that the mineral can be mined, extracted, removed, and marketed at a profit. 43 CFR 3520.1-1(c). Thus, for instance, if an applicant could reasonably expect that mining technology would be developed within a reasonable period of time so as to make extraction of the mineral profitable, evidence of such reasonably anticipated technological improvement could be introduced to demonstrate that a

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<sup>2/</sup> The prospecting permits C-0118328 and C-0118329 have a Mar. 31, 1966, expiration date and prospecting permit C-0120057 has an Apr. 30, 1966, expiration date.

<sup>3/</sup> In this context, we conclude, contrary to appellants' objection, that appellants were properly required to show at the final showing stage that their proposed mining activities would not adversely affect oil shale resources, which would be specifically protected under the proposed lease, and the economics of any protective measures. These considerations were crucial to determining whether the sodium deposit is "valuable." We also note that the requirement that appellants submit a detailed mining plan was consistent with 43 CFR 3521.1-1.

valuable deposit did exist as of the dates of expiration of the permits. On the other hand, speculation regarding what improvements in mining technology might be developed in the future is not relevant to this determination.

At the hearing herein ordered, appellants shall have both the burden of going forward and the ultimate burden of proof. Appellants must show, by a preponderance of the evidence, that they discovered a valuable deposit of sodium and that the subject lands are chiefly valuable for sodium. <sup>4/</sup> 43 CFR 3521.1-1(j)(3). The Administrative Law Judge assigned to the case shall render a decision which shall be, in the absence of a timely appeal to the Board, final for the Department.

Appellants also contend that the 18-year delay in adjudicating their lease applications constitutes a denial of due process, which compels issuance of preference right leases. Departmental regulation 43 CFR 1810.3 provides that delays in the performance of duties by agents or officers of the United States cannot operate to vitiate or cause to be lost the authority of the United States "to enforce a public right or protect a public interest." In the present case, the Secretary must determine whether land in a sodium prospecting permit contains a valuable deposit of sodium and is chiefly valuable for sodium under 30 U.S.C. § 262 (1982), prior to the issuance of a lease. Until that determination is made, a preference right lease cannot issue consistent with the statute. We cannot say that under the circumstances of this case the Department's delay in adjudicating appellants' lease applications was unreasonable so as to constitute a denial of due process, requiring issuance of preference right leases. Cf. Utah International Inc. v. Andrus, 488 F. Supp. 976, 984 (D. Colo. 1980).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is referred to the Hearings Division for further action consistent herewith.

R. W. Mullen  
Administrative Judge

We concur:

Wm. Philip Horton  
Chief Administrative Judge

Will A Irwin  
Administrative Judge

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<sup>4/</sup> The hearing should particularly consider the question of whether issuance of the leases to Wolf Ridge and others in 1971 with respect to adjacent land indicates the presence of valuable sodium deposits with respect to the land involved herein. These leases were based on prospecting permits which purportedly expired at the same time as the prospecting permits held by appellants or their predecessors-in-interest. Similarly, the prior Survey determinations that the land subject to the applications does contain valuable deposits of sodium and is chiefly valuable for sodium are considered to be relevant to this determination.

